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Held at Headquarters, New York,
on Wednesday, 8 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

CONTENTS

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 10.20 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

1. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 6 of the draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1) said that there would not necessarily be only one preparatory conference; it was conceivable that several conferences might be held in succession. Therefore, it was necessary to modify paragraph 6, and possibly paragraph 31, accordingly.

2. Mr. OLIVENCIA (Spain), referring to the wording of paragraphs 1 and 2, said that while the intent of the drafters had been correct, the text appeared to establish the precedence of an arbitration agreement between the parties over national arbitration legislation. In the case of a conflict, however, it was clearly national arbitration legislation, which was an element of positive law, that ought to take precedence over an arbitration agreement, which was purely contractual in nature. It might be useful to spell out that point in the text. He agreed with the representative of Mexico with regard to paragraph 6. As to the issues that should be taken up at the preparatory conference or conferences, it might be dangerous to discuss substantive issues, since they would be decided by the arbitral tribunal. The wording of paragraph 33 was thus somewhat ambiguous. With regard to paragraph 6, it was up to the arbitral tribunal to determine the advisability of holding a pre-conference hearing in the light of the specifics of each case; a preparatory conference was not always necessary and, as the representatives of China and France had already noted, it was a practice that should not be made general.

3. Mr. LOBSIGER (Observer for Switzerland) said he was particularly pleased with the quality of the documents prepared by the secretariat - given that Zurich and Geneva were two cities that had many arbitral tribunals; Switzerland was thus following the matter closely. The "annotated check-list" (A/CN.9/396/Add.1, chap. III) might be quite useful at all stages of arbitral proceedings, even later on in the process. The issue of whether the preparatory conference should be limited to questions pertaining to format or the organization of negotiations was a very real one: how were the parties to be prevented from discussing issues of substance, particularly if they were present at the preparatory conference? Furthermore, as already noted, there was a risk that the arbitral proceedings might be in conflict with national legislation.

4. Mr. HERRMANN (Secretary of the Commission) noted that Switzerland had made a significant contribution to the preparation of the documents, since a Swiss arbitration specialist had taken part in that effort.

5. Ms. VERRALL (United Kingdom) sought clarification from the representative of Spain as to whether he thought that the convening of preparatory conferences prior to arbitral proceedings should be encouraged.

6. Mr. OLIVENCIA (Spain) said that a preparatory conference was in no way compulsory. While it might be useful for the parties to hold preparatory conferences, that practice should not be encouraged or made general, since it was up to the arbitral tribunal to determine the advisability and usefulness of such conferences in each specific case.

7. Mr. WANG Dianquo (China) said he did not believe that paragraph 4 of the draft Guidelines was the place to discuss the planning of proceedings by the arbitral tribunal. Preparatory conferences should be conducive to a harmonious understanding between the parties, the lawyers and the members of the tribunal, and if proceedings were not well planned, the consequences could only be negative. In the absence of adequate planning, arbitral proceedings were not very likely to produce the desired outcome.

8. Mr. CHATURVEDI (India) said that document A/CN.9/396/Add.1 should draw the attention of the parties and the arbitrator to certain substantive questions that had to be discussed before a dispute was settled through arbitration. It would be more appropriate to refer to "preparatory meetings", since the word "conference" evoked a gathering of several participants. As the observer for Switzerland had noted, the check-list in chapter III would highlight fundamental questions and indicate when they should be considered.

9. Mr. SEKOLEC (International Trade Law Branch) said that the expression "preparatory conferences" had been chosen instead of "preparatory meetings" because it had been thought that the word "meeting" conveyed the idea of a physical gathering, with the parties and the arbitrators coming in person to a meeting place. However, the draft Guidelines indicated that such consultations could also take place via telecommunications, a concept which the word "meeting" seemed unable to convey.

10. Mr. CHATURVEDI (India) said that the word "conference" did not exclude the use of telecommunications and had exactly the same connotation as the word "meeting", namely "physical encounter".

11. Mr. CHOUKRI SBAI (Morocco) said that, as its title indicated, the document under consideration consisted of draft guidelines. Guidelines were neither compulsory nor binding, nor was recourse to a preparatory conference which was why he considered the document to be useful and approved of it entirely. In fact, it could be used not only in international arbitral proceedings, but also in national proceedings. Morocco had made arbitration part of its legislation and used it in both commercial and other civil cases. Preparatory conferences or meetings were very useful. Arbitration was in fact an altogether different area from the legal sphere. In a trial, lawyers or attorneys attempted to convince not only judges but also their clients of their professional abilities and competence. They had, to a certain extent, something to sell. Arbitration, on the other hand, was a secret and confidential procedure in which one could better express one's ideas and avoid any tension. Furthermore, recourse to arbitration was completely optional. While his delegation did have some reservations regarding certain aspects of the document under consideration, it was not as pessimistic as the French delegation and fully supported all the guidelines contained therein. Indeed, the document made it possible to assist the parties without imposing any solutions or procedures on them.

12. Mr. TUVAYANOND (Thailand) said that his delegation greatly appreciated the work done by the secretariat in preparing a set of highly useful guidelines. While the principle of preparatory conferences was justified, it should not be compulsory. A conference should be held only when necessary and when the advantages it offered justified the cost and time involved. Instead of the word "conference", his delegation preferred the word "consultations", which could easily be applied to electronic mail communications. As stated in paragraph 20 of the draft Guidelines, a preparatory conference was often convened on the initiative of the arbitral tribunal or the presiding arbitrator. In Thailand's view, the arbitrator could not convene a conference or meeting without good reason, and would not do so if the parties did not believe such a conference would be useful. His delegation did not see how a conference could be convened in disregard of the parties' reservations or objections. Arbitral proceedings depended on the ability of the parties to agree on the rules of those proceedings or even to let the arbitrators determine them. In other words, the parties had complete control; it was up to them to determine the procedure that would be followed and even to authorize arbitrators to rule on the basis of equity and not solely on the basis of legal precepts. The two parties could make use of the preparatory or preliminary consultations to raise their reservations and objections and provide the necessary clarifications to the arbitral tribunal or presiding arbitrator.

13. Mr. HOLTZMANN (United States of America), referring to the comments made by the representative of the secretariat, said that his delegation was in favour of using the word "conference" in the draft text submitted by the secretariat. In his delegation's view the word "conference" also suggested the possibility of negotiations and compromise. The agenda items proposed in chapter III frequently used the expressions "enquire whether the parties" or "seek opinion from the parties". The word "conference" was preferable to "consultations", because the latter term could lead to the conclusion, which had in fact been drawn by the representative of Thailand, that the two parties must agree to the holding of a meeting and to the ensuing procedural arrangements. It should be possible to hold such conferences if the tribunal so desired, and no party should be able to prevent them from being held because it wished to disrupt the proceedings and resort to delaying tactics, as often happened in arbitral proceedings. The two parties would naturally have the ability to prevent an arbitral tribunal from holding a hearing. Article 15 of the UNCITRAL Arbitration Rules provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate, which seemed to indicate that the parties could not prevent a hearing from being held prior to a preparatory conference. On the other hand, it must be remembered that article 1 of the UNCITRAL Rules preserved the right of the parties to modify those Rules in order to prevent arbitrators from holding a preparatory conference. Only in that way could the parties prevent the holding of a conference, although that would be an exceptional situation that did not need to be dealt with in the commentary.

14. Mr. SHIMIZU (Japan) said that he, too, wished to thank the secretariat for its excellent work. He would welcome clarification of the use of the expressions "procedural law" at the end of paragraph 2 and "law applicable to the arbitration" in paragraph 18 of the draft Guidelines. He wondered whether

that difference in terminology was deliberate and, if so, what its significance was.

15. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not see the two terms as referring to different concepts. The term "procedural law" should not be confused with the term "law on procedure", the rules of procedure applicable to hearings or trials, in other words, to the code of civil procedure. Some delegations had suggested that the term "law applicable to the arbitration" might also cover substantive questions. It would be wrong to interpret that expression as referring to the law applicable to the substance of the litigation that was the subject of the arbitration. Indeed, the intention was to refer throughout the text of the draft Guidelines to the procedure that governed the arbitration, a notion which could be rendered, for example, by a term such as "arbitration law".

16. Mr. FOUCHARD (France) said that he shared many of the views expressed by the representatives of Spain, China and Thailand. He was pleased to note that the secretariat's understanding of the term "conference" covered cases in which there would be no physical meeting. It was clear that consultations by means of telecommunications were not only still possible, but inevitable. It was difficult to understand how an arbitral tribunal could conduct a proceeding without communicating with the parties' legal counsel as to its organization. If the Commission could be satisfied with the term "consultations", there would be no need for further discussion, and it would simply have to draft a guide or some kind of user's manual, as the representative of the United States of America had suggested, which might include the "check-list" of topics to be considered by the tribunal. Unfortunately that was not the case and there was still a strong tendency, if not to impose, at least strongly to suggest that, conferences or physical meetings should be held at the outset of the proceedings.

17. With regard to the discussion on section A of chapter I, one had to wonder, as the representative of Thailand had noted, what would happen if one party refused to participate immediately in a conference. The representative of the United States of America had said that the arbitral tribunal could disregard that refusal, since it had the power to do so in general under the terms of the UNCITRAL Arbitration Rules. Such an attitude would hardly be desirable. It was possible that the refusal to participate in a preliminary conference at the outset of the proceedings might be justified by a party's fear of having to "show its hand" right away while the other side's case and position were still unknown, or simply by its wish to buy some time for reflection. Nevertheless, the conference would take place by default. The position of the two parties - generally that of the respondent - would thus be hardened into an attitude of refusal which would jeopardize all subsequent cooperation. The problem was a serious one, and even if the opinion of the representative of the United States of America was justified in law, it could be dangerous in practice.

18. On the question of whether preliminary conferences were widespread, paragraph 8 indicated that they would be more frequent when the parties assumed a high degree of procedural initiative. It was clear that the focus was on procedures derived from common law and from the production of evidence in common law, more specifically the procedure known as discovery. That procedure often

imposed on State jurisdictions methods of pre-trial discovery which, while not without merit, were nevertheless cumbersome and complex. He did not mean to criticize such procedures but merely to suggest that it might be dangerous to try to generalize them or to apply them to international arbitration. It was important to note that two major rules of two major arbitration institutions, the American Arbitration Association, in its rules governing international arbitration, and the London Court of International Arbitration, also in its international rules, had been careful not to mandate preliminary conferences or a preliminary hearing on evidence or an obligation to produce evidence. That had been done so as not to exclude parties from other legal cultures. The Guidelines before the Commission stated that the aim of UNCITRAL was harmonization. He wondered whether it was really advisable to impose on practitioners of arbitration from Europe, Africa, Latin America and many Asian countries - in other words, practitioners who represented the cultures of a large number of civil law countries - the discussion of evidence which was central to the check-list of possible topics for preparatory conferences contained in chapter III. Hearings on evidence did not exist in European practice, and it was to be feared that, by seeking, under the pretext of harmonizing, to impose a solution which was neither the one provided for in the UNCITRAL Arbitration Rules nor the one in the American and British rules on international arbitration, serious difficulties might be created instead. Article 15 of the UNCITRAL Arbitration Rules gave the arbitral tribunal the power to conduct the proceedings as it considered appropriate. Article 25 stated that the tribunal was empowered to rule on evidence and its admissibility. Introducing, through such preliminary conferences, a hearing and initial arrangements - or even initial arguments - concerning evidence would run counter to the objective of harmonization.

19. Mr. GOH (Singapore) said that, like the representative of the United States of America, he preferred the word "conference" to "meeting". Several international arbitral rulings had been rendered in Singapore in recent years, and it was not uncommon for the defendant to do all he could to delay the outcome of the proceedings for as long as possible.

20. Mr. ABASCAL ZAMORA (Mexico) noted that, in the Spanish version of document A/CN.9/396/Add.1, the English word "conference" should be rendered by "conferencia" and not "reunión". It was important to note that arbitrators could communicate long-distance and that it was not essential for them to meet. The guidelines clearly stipulated that preliminary conferences should respect the arbitration rules agreed upon by the parties as well as the laws applicable to arbitration and the will of the parties. The parties could object to the holding of a preparatory conference, but it was the arbitrators who made the final decision while ensuring, in conformity with article 15 of the UNCITRAL Arbitration Rules, that the parties were treated with equality and that they were given every opportunity to assert their rights and to propose their methods.

21. Mr. TUVAYANOND (Thailand) said that once an agreement had been reached, it would be necessary to prevent delaying tactics. Taking a decision by default, however, would mean imposing one party's point of view on the other party and unilaterally modifying the arbitration rules, in violation of international law. Moreover, since preparatory conferences were supposed to deal only with

questions of procedure, and given that their cost was too high for the poorest countries and that they might result in a loss of time, they should be held only if they were really justified. If a conference did take place, refusal to participate should be considered as proof of bad faith in order to discourage delaying tactics.

22. Mr. AL-NASSER (Saudi Arabia) said that the only concern of the authors of the draft Guidelines was to improve the arbitration procedure and to make it more effective. They considered, however, that preparatory conferences were indispensable. Such conferences, which sought only to clarify procedure, were a common practice in Saudi Arabia and in international litigations to which Saudi Arabia was directly or indirectly a party. Moreover, the parties would always be free to accept or refuse a preparatory conference. As for the term that should be used to designate them, that was a matter of secondary importance.

23. The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

24. Mr. CHATURVEDI (India), returning to the question raised by the representative of Japan concerning the terms used in the last sentence of paragraph 2 and in paragraph 18, said that the texts would be clearer if in paragraph 2 the term "procedural law" was replaced by "procedural rules". He also wondered whether there was not a contradiction between paragraph 3 and the first point raised in paragraph 2.

25. Mr. CHOUKRI SBAI (Morocco) said that, in his country, the words "meeting" and "session" implied the presence of the parties, while the word "conference" was used for cultural, political or scientific gatherings. It would therefore be best to use the word "deliberation". That term would be well suited to long-distance communications, which did in fact save time and money.

26. Paragraph 21 offered a satisfactory response to the question of what should be done when one party objected to the holding of a preparatory conference. However, the following paragraph suggested that a preparatory conference might take place despite the objections of one of the parties, which was contrary to the rules of arbitration. It should be made clear at the end of paragraph 22 that a preparatory conference could be held despite the reservations or objections of a party, provided that it was not prejudicial to the interests of that party, that it did not deal with questions of substance and that it respected the procedure or compromise agreed upon by the parties. In any case, the matter deserved further consideration.

27. Mr. TUVAYANOND (Thailand) said that preparatory conferences should be held only in exceptional cases and where they were genuinely useful, in other words indispensable for the proper conduct of the arbitration proceedings. Questions of substance should not be addressed in preparatory conferences, especially if one of the parties was absent, since such conferences did not give the parties a full opportunity of presenting their case. It was conceivable, however, that a decision might be taken on the substance, with the agreement of all the parties. Moreover, if the parties reached agreement on any point, that agreement must be mentioned in the document.

28. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said he shared the view of the representative of France that, broadly speaking, the current international arbitration rules did not make specific provision for the holding of preparatory conferences. Nevertheless, recourse was often had to that type of conference when arbitration proceedings were conducted under the arbitration rules of the International Council for International Arbitration, the London Court of International Arbitration, UNCITRAL or the American Arbitration Association, regardless of whether the tribunal or its presiding arbitrator operated under the common law system or under Roman law.

29. The fears expressed by some delegations that such conferences might result in higher costs were unwarranted, since the aim of the conferences was precisely to reduce some of the costs incurred by any arbitration proceedings. Naturally, it would be for all the parties to the proceedings to exercise close control over costs and to refrain from holding a conference if the costs were not justified. Moreover, experience had shown that most arbitration proceedings for which a conference had been carefully and effectively prepared had lower costs.

30. Mr. LEVY (Canada), referring to the notion of a preparatory conference in the context of an arbitration agreement, said that arbitration generally resulted from the provisions of a commercial agreement between the parties which frequently stipulated only that any dispute would be settled by arbitration, without establishing any type of procedure and certainly without providing for a preparatory conference. It was therefore dangerous to proceed as if the parties always agreed to settle questions of all kinds and perhaps to render a preparatory conference useless. It must be specified, then, that in certain cases, where the parties had recourse to arbitration, they did so solely on the basis of a contractual arrangement which stipulated that all litigation must be submitted to arbitration. Those hypotheses were therefore arguments in favour of the holding of preparatory conferences.

31. Mr. TUVAYANOND (Thailand) reiterated his view that there were actual cases in which the arbitration agreement was silent on the procedure, so that the parties were forced to have recourse to preparatory conferences under the auspices of an arbitral tribunal. It was still often necessary to establish that a conference of that type was essential. To do otherwise would be inconsistent with the purpose of arbitration, which was to accelerate the search for a solution to the dispute, since both the workload and the cost of the proceedings would be increased.

32. Ms. VERRALL (United Kingdom) supported the views expressed by the observer for the International Council for Commercial Arbitration; in fact, the purpose of preparatory conferences was to accelerate the arbitral proceedings and reduce costs. The requirement suggested by the representative of Thailand was therefore lacking in logic.

33. Mr. SEKOLEC (International Trade Law Branch) said he was surprised that the current draft Guidelines should have given the false impression that preparatory conferences were the only or the best method of settling questions of procedure during arbitration; in fact, the text suggested that there were other options (consultations between the arbitrators by themselves, no meetings at all between

the parties when, for example, they had reached agreement on the approach to follow and the questions to put to the arbitral tribunal, etc.). There was no doubt that, like all human activities, arbitration benefited from being well prepared, and preparatory conferences could be the mechanism that was best suited to that purpose and, consequently, the preferred mechanism; but they represented only one of many modalities for preparing the proceedings. Moreover, problems of terminology could be resolved and the expression "preparatory meeting" used, for example, to designate any meeting in which the parties participated in person, while "preparatory conference" or "preparatory consultations" could be used as a generic term.

34. Mr. CHOUKRI SBAI (Morocco) suggested that, for reasons of consistency, the expression "preparatory deliberations" should be used to refer both to meetings at which the parties were physically present and to consultations, communications and telecommunications; all references to meetings or consultations would thus be avoided.

35. Mr. HOLTZMANN (United States of America) observed that the term "deliberations" had a very precise meaning, especially in the field of international arbitration. It referred to the discussions which the arbitrators held among themselves with a view to reaching a decision and was therefore inappropriate in the context of preparatory conferences.

36. Mr. OLIVENCIA (Spain) suggested that consideration should be given to the proposals made by the secretariat in paragraphs 10 and 11 of the draft with regard to the term "preparatory conference".

37. Mr. ABASCAL ZAMORA (Mexico) said that, in addition to the different terms used, it might be useful to define the concept of "preparatory conference" to make it clear that it referred to a meeting which could be held after the constitution of the arbitral tribunal and whose purpose was to prepare the arbitral proceedings.

38. Mr. OLIVENCIA (Spain) said that he shared the view of the representative of Mexico. He also suggested that the Spanish version, which used the term "preparatory meeting", should be brought into line with the English and French versions, which referred to "preparatory conferences". Furthermore, in so far as the term did not always refer to a meeting of persons in the proper sense, his delegation was ready to agree to the use of the term "preparatory conference", which had a much broader sense in the context of arbitration. The term "deliberations", on the other hand, which referred to an intellectual exchange between the arbitrators aimed at reaching a decision, was obviously unsuitable in that context. The best expression was clearly "conference".

39. Mr. TUVAYANOND (Thailand) said that, in light of the statement made by the representative of Canada, the adjective "preparatory" would be more appropriate than the adjective "preliminary" or the expression "pre-hearing". He therefore supported the use of the term "preparatory conference".

40. Replying to the representative of the United Kingdom, he said that if the preparatory conference was not essential, it would in fact be tantamount to

adding another phase to the arbitral proceeding and thus to delaying those proceedings and multiplying their cost.

41. Mr. GRIFFITH (Observer for Australia) said he agreed with the representative of Spain that section B could be entitled "Terminology - preparatory conference" in order to reflect the content of paragraphs 10 and 11 more accurately.

The meeting rose at 1 p.m.